

1
2 UNITED STATES
3 ENVIRONMENTAL PROTECTION AGENCY
4 REGION 10

5 IN THE MATTER OF)

6 Portland Harbor Superfund Site)
7 Portland, Multnomah County, Oregon)

8 Daimler Truck North America LLC,)
9 Vigor Industrial LLC,)
10 Cascade General, Inc., and)
11 Shipyard Commerce Center LLC)

12 Respondents;)

13 Maritime Administration;)
14 United States Coast Guard; United States)
15 General Services Administration;)
16 Bonneville Power Administration;)

17 Settling Federal Agencies;)

18 and the State of Oregon, acting by and)
19 through the Oregon Department of State)
20 Lands; City of Portland; and the Port of Portland,)

21 Settling Public Entities.)
22 Proceeding Under Sections 104, 107, and)
23 122 of the Comprehensive, Environmental)
24 Response, Compensation, and Liability Act,)
25 42 U.S.C. §§ 9604, 9607 and 9622)

NO. CERCLA Docket No. 10-2021-001

REQUEST FOR FORMAL DISPUTE
RESOLUTION
STATEMENT OF POSITION TO EPA

26 Pursuant to the Administrative Settlement Agreement and Order on Consent for Remedial
Design at the Swan Island Basin Project Area (“Settlement”), CERCLA Docket No. 10-2021-001,
and in accordance with section XIV subparagraph 48, Daimler Truck North America LLC,
Cascade General, Inc., Shipyard Commerce Center LLC, and Vigor Industrial LLC (collectively,

1 the "Respondents"), submit this Statement of Position to initiate a formal dispute resolution
2 process.

3 On May 23, 2022, in accordance with the Settlement, paragraph 46, the Respondents
4 submitted a Notice of Dispute regarding the payment of EPA's Bill for Collection No.
5 2702226S0064 ("EPA Bill") sent to Respondents on April 21, 2022, which invoiced Respondents
6 in the amount of \$142,661.85 for "site-wide remedial design ("RD") costs incurred by U.S. EPA
7 Region 10 ("EPA") and for "response activities conducted at the Portland Harbor Superfund site
8 under the authority of the Comprehensive Environmental Response, Compensation, and Liability
9 Act, 42 U.S.C. §9601-§9675, as amended." Attached as Exhibits A and B are copies of the EPA
10 Bill and subsequently provided documentation. Respondents' May 23, 2022 Notice of Dispute is
11 attached as Exhibit C. Respondents submitted \$5,800.03 into an escrow account on May 23, 2022,
12 which represents the amount of the EPA Bill that is uncontested. Respondents disputed the
13 remaining balance of \$136,861.82.

14 Respondents and EPA (collectively, the "Parties") were unable to reach resolution of this
15 dispute during the informal negotiation period. Accordingly, the Respondents seek to have the
16 dispute resolved by the EPA Region 10 Administrator.

17 18 **I. BACKGROUND**

19 **A. Key Definitions**

20 The Settlement was drafted and negotiated by the Parties to facilitate and implement remedial
21 design at the Swan Island Basin Project Area, "including area-specific pre-remedial design
22 sampling and related investigations to inform later RD." See Settlement at Section III, "Statement
23 of Purpose" ¶ 9. In furtherance of that purpose, Respondents agreed to pay to EPA "all EPA Future
24 Response Costs" from the effective date of January 20, 2021. The term "EPA Future Response
25 Costs" is defined under the Settlement as:
26

1 all costs, including direct and indirect costs, that the EPA incurs in reviewing or
2 developing deliverables submitted pursuant to this Settlement for the Swan Island
3 Basin Project Area, in overseeing implementation of the Work, or otherwise
4 implementing, overseeing, or enforcing this Settlement... EPA Future Response
5 Costs also include all costs, including direct and indirect costs, paid or incurred by
6 EPA, prior to the Effective Date, in connection with negotiating this Settlement and
7 charged to account 10SW beginning on September 15, 2020, and account 10TC
8 beginning on September 1, 2020. EPA Future Response Costs shall not include the
9 costs of EPA oversight or data collected by EPA concerning any other response
10 action or Settlement Agreement associated with the Site or other activities that do
11 not specifically pertain to this Settlement including the implementation of the
12 attached SOW. EPA Future Response Costs shall not include costs incurred by
13 SFAs or costs incurred by any department, instrumentality, or agency of the United
14 States that are not related to overseeing and/or performing the Work. [emphasis
15 added]. See Settlement at Section IV, “Definitions” ¶ 10 “EPA Future Response
16 Costs.”

17 The Work to be implemented is specifically defined as “all activities and obligations
18 Respondents have agreed will be performed under this Settlement to complete RD for design of
19 the remedy that will be implemented within the Swan Island Basin Project Area.” See Settlement
20 at Section IV, “Definitions” ¶ 10 “Work.” The definitions of “Settlement,” “Statement of Work,”
21 and “SIB Project Area” under ¶ 10 are also relevant to this disputed and are provided below:

22 “Settlement” shall mean this Administrative Settlement Agreement and Order on
23 Consent, the attached Statement of Work and all other appendices attached hereto
24 (listed in Section XXV (Integration/Appendices)). In the event of conflict between
25 this Settlement and any appendix, this Settlement shall control.

26 “Statement of Work” or “SOW” shall mean the document describing the activities
Respondents have agreed to perform, which is attached as Appendix A.

“Swan Island Basin Project Area” or “Project Area” for purposes of this Settlement
shall mean the active cleanup area designated on Figure 31d of the ROD between
approximately River Mile 8.1 and River Mile 9.2 on the northeast side of the
Willamette River, and more specifically depicted on the map attached as Appendix
B to the Settlement. The Project Area is approximately 1.1 miles in length, 117
acres in size, and includes all riverbanks from top of the bank to the river.

The above definitions terms define the scope and location of all RD activities required to
be performed pursuant to the Settlement. These definitions establish the lens through which the
Parties agreed to view the activities to be characterized as EPA Future Response Costs related to
RD in the SIB Project Area. To remove any doubt about what is or is not an EPA Future Response

1 Cost (or to provide further clarification of such costs), the Settlement specifically defines, in the
2 last two sentences of the definition, what are NOT EPA Future Response Costs. Together these
3 costs will be referred to as “Excluded Costs” in this Statement of Position.

4 **B. Financial Concerns**

5 In negotiating the Settlement, the Respondents worked closely with the EPA to carefully
6 calculate and estimate the funding necessary to fulfill the requirements of this Settlement. This
7 was done to allow the parties to the Settlement to set aside funds for this specific purpose. These
8 calculations were based entirely on the agreed definition of the “EPA Future Response Costs”
9 within the Settlement. In other words, these amounts did not include costs that were incurred prior
10 to September 1, 2020, that are unrelated to RD activities in the Swan Island Basin Project Area or
11 that are related to other areas or response actions at the Site. Any costs outside of this agreed
12 definition will exceed this cost estimate and will likely result in the Respondents failing to have
13 sufficient funds to complete the work for the Remedial Design. Accordingly, it is essential at this
14 early stage of the Parties working relationship that all EPA Bills submitted to the Respondents for
15 payment under the Settlement Agreement are within the negotiated definition of EPA Future
16 Response Costs.

17 It is important that EPA understand that Respondents worked diligently with EPA to
18 assemble a group of public and private parties to help fund the RD work at the SIB. Respondents’
19 purpose in doing so was to assert leadership and activate the RD process so that the SIB area did
20 not languish and fall behind the overall remedial design process at the Portland Harbor Superfund
21 Site (the “PH Site”). The Respondents and the parties who agreed to help fund the Work, the
22 Settling Federal Agencies and Settling Public Entities, wished to advance the Work and committed
23 funds to do so. However, those funds are not unlimited.

II. ARGUMENT

Consistent with the language of the Settlement, Respondents dispute certain EPA Payroll Costs, both direct and indirect, and certain Remedial Action Contract Strategy costs, as set out in EPA's Certified Cost Recovery Package for Portland Harbor Gen RD Oversight, Portland, Oregon, Site ID = 10TC ("Cost Recovery Package"), and Task Order Progress Report, Portland Harbor (10TC), Invoice Nos. 1 through No. 21 ("Contractor Invoices"). Respondent's dispute those costs because they are not within the definition of EPA Future Response Costs under the Settlement.

A. Respondents dispute all costs incurred prior to before September 1, 2020 and charged to account 10TC.

Under the Settlement, Respondents are only responsible, for costs "paid or incurred by EPA, prior to the Effective Date," that are "in connection with negotiating this Settlement and charged to account 10SW beginning on September 15, 2020, and account 10TC beginning on September 1, 2020." An excerpt from a draft of an earlier version of the Settlement shows that the obligation was initially drafted to address only EPA's costs to negotiate the Settlement, but EPA added in 10TC costs at a later stage of the negotiations:¹

Resolution) and all reasonable litigation costs. EPA Future Response Costs shall also include, but not be limited to, direct and indirect costs paid or incurred by EPA, prior to the Effective Date, in connection with negotiating this Settlement and charged to account 10SW and account 10TC beginning on September 15, 2020. EPA Future Response Costs shall not include the costs of EPA oversight or data collected by EPA concerning any other response action or Settlement Agreement associated with the Site or other activities that do not specifically pertain to this Settlement including the implementation of the attached SOW. EPA Future Response Costs shall not include costs incurred by SFAs or costs incurred by any department, instrumentality, or agency of the United States that are not related to overseeing the Work.

Commented [SIBRD GRP7]: Willamette Cove ASAO

Commented [MS8]: Stephanie M.: 10TC is the account to which EPA bills work done that applies to and benefits every RD project, such as programmatic BA and coordination with NMFS, RD guideline development and public meetings. The 10TC bill is divided amongst all the Project Areas.

Commented [SIBRD GRP9]: Willamette Cove ASAO

Commented [SIBRD GRP10]: B1a Project Area ASAO

Commented [SIBRD GRP11]: Willamette Cove ASAO

The comment from the EPA Assistant Regional Counsel noted above identifies the type of site-wide activities that would be billed to account 10TC. In a subsequent draft, EPA changed the date associated with account 10TC charges to September 1, 2020. Therefore, it is Respondents understanding that they would be responsible for costs associated with negotiations that were

¹ See Mairs, S. Email to Jennifer Sanscrainte, June 14, 2022.

1 incurred by EPA starting on September 15, 2022, the date the Respondents provided its offer of
2 settlement and its comments on EPA's Portland Harbor Model ASAO for Remedial Design
3 ("Model ASAO"). And, that Respondents would be responsible for costs incurred for work
4 performed after September 1, 2020 that benefitted every project area.

5 However, the EPA Cost Recovery Package and Contractor Invoices include reporting
6 periods beginning as early as May 27, 2020. These costs were undoubtedly "incurred" before
7 September 1, 2020 and, therefore, are not EPA Future Response Costs. During the recent informal
8 negotiation period, EPA explained that the Agency defined the term "incurred" to mean the date
9 on which EPA *received the invoice* as the basis for justifying its inclusion of costs dated months
10 before the September 1, 2020. This ad hoc definition for the term "incurred" has no basis and
11 should be rejected.

12 It is a generally recognized principle of contract interpretation that contract terms must be
13 interpreted to give effect to the intent of the parties at the time they entered the contract, giving the
14 words their ordinary meaning unless otherwise defined by the parties. *Scribner v. Worldcom, Inc.*,
15 249 F.3d 902, 908 (9th Cir. 2001); see *Klamath Water Users Protective Ass'n v. Patterson*, 204
16 F.3d 1206, 1210 (9th Cir. 1999), opinion amended on denial of reh'g, 203 F.3d 1175 (9th Cir.
17 2000). The ordinary meaning for "incur" is "to become liable or subject to" a cost or expense.
18 "Incur." Merriam-Webster.com Dictionary. As the Ninth Circuit explained, in a case in which
19 they rejected an argument similar to the one being made by EPA, "a claim is ordinarily understood
20 to be 'incurred' when a service is rendered, not when the [business] decides to bill for the services."
21 *See Perris Valley Cmty. Hosp., LLC v. S. California Pipe Trades Admin. Corp.*, 634 Fed. Appx.
22 616, 617 (9th Cir. 2016) (holding "the phrase 'claims incurred since January 1, 2001' in the
23 Supplement means claims for services rendered after January 1.")

24 EPA did not provide the Performing Parties or the Funding Parties with any information
25 that would lead them to assume that EPA intended to apply a different definition of the term
26 "incurred" that would result in the Respondents being obligated to pay costs based on the various

1 billing practices of EPA's contractors. The plain language of the Settlement provides that
2 Respondents will pay all costs for activities and obligations that took place on or after September
3 1, 2020. Activities and obligations dated before that date are not EPA Future Response Costs for
4 which Respondents are responsible in accordance with the Settlement.

5 Accordingly, Respondents formally dispute Contractor Invoice Nos. 1 through 3, as the
6 period of performance is prior September 1, 2020. Contractor Invoice No. 4 has a performance
7 period of 8/23/2020 to 09/26/2020. Because the invoice does not break out the work performed
8 by date, the Respondents do not dispute the invoice *in toto* as to post-September 1 activities, but
9 they do dispute some individual tasks as discussed further below.

10 **B. Respondents dispute all EPA costs in the EPA Discovery Package that**
11 **do not benefit all project areas or are specific to particular project**
12 **areas.**

13 Respondents dispute certain Contractor Invoices and EPA payroll costs, both direct and
14 indirect, as set out in the Cost Recovery Package, where the document does not demonstrate that
15 those costs were incurred for, or where there is no or insufficient evidence demonstrating that,
16 EPA's activities do not benefit all project areas or are specific to individual project areas. For
17 many such costs, further description may identify these invoices as allowable costs. For others, it
18 is undeniable that these costs are Excluded Costs under the Settlement.

19 EPA's Cost Recovery Package provided no information regarding the work that was
20 performed and charged to account 10TC. However, EPA subsequently provided the Contractor
21 Invoices, which provide descriptions of work performed (under various tasks and amounts charged
22 per task) under CDM Smith's contract with EPA. So that they could better understand the EPA
23 billing procedure, the Respondents requested that their consulting expert, TIG Environmental
24 ("TIG"), review the Contractor Invoices to determine if the work performed was for "site-wide
25 remedial design ... incurred for activities that apply to and benefit the entire site and are not
26 specific to any one project area." TIG's Technical Evaluation of EPA and CDM-Smith Charges
under 10TC Contract ("Evaluation") is provided as Exhibit D.

TIG sorted the task descriptions into four categories (color-coded) based upon specific criteria. Those categories are listed in Table 1 below.

Table 1. CDM Smith Costs by Category

Red total (Category 4: not within EPA future response costs)	\$237,027.59
Orange Total (Category 3: likely not within EPA future response costs)	\$303,897.13
Yellow Total (Category 2: likely within EPA future response costs)	\$403,009.57
Green Total (Category 1: within EPA future response costs)	\$278,631.68
Total	\$1,222,565.97

For the purpose of their review, TIG annotated the Contractor Invoices by marking the items under each task on each invoice by using the above color-coded categories. The Contractor Invoices only provided dollar amounts by task. However, per TIG's Evaluation, some tasks had items listed for work that fell into multiple color categories. Where TIG denoted multiple categories for a given task in a single billing period, it designated the entire task on that invoice as the highest numbered color category present to determine the amounts provided in Table 1. For example, if the work described for a specific task on a specific invoice contained items denoted as yellow (category 2) and green (category 1), TIG assigned the entire task amount to the yellow (category 2) category. A copy of the complete TIB color-coded evaluation is in Exhibit D.

1. Respondents dispute a significant amount of CDM Smith costs as either not EPA Future Response Costs or as Excluded Costs under the Settlement.

Respondents dispute all costs for the tasks identified in TIG's evaluation of the Contractor's Invoices that are in category 4 (red) as not within the definition of EPA Future Response Costs. For example, many of the items listed on Task 4.0 – Community Involvement Support on the Contractor Invoices refer to community meetings and community involvement activities for the Cathedral Park Project Area (See invoice nos. 4,5, 8–10, and 12–16 (Exhibit D, Attachment 1)). EPA's Bill indicated that the costs are "site-wide remedial design oversight costs

1 were incurred for activities that apply to and benefit the entire site and are not specific to any one
2 project area,” yet those charges are specific to the Cathedral Park Project Area and are Excluded
3 Costs.

4 During informal dispute discussions, Region 10 staff indicated that the Cathedral Park
5 community involvement activities provided general information to the community regarding the
6 remedial design process and, as such, are proper 10TC costs. However, the Respondents were not
7 invited to participate in and received no notice of such activities. In fact, the Respondents had no
8 knowledge of the Cathedral Park Project Area activities until they received the requested backup
9 documentation for the 10TC invoice. Further, the documentation provided by EPA in support of
10 these costs lacks sufficient detail to determine if and how the activities benefit the entire PH Site.
11 And last, the Respondents question how such public outreach could benefit the entire PH Site if
12 the community interested in the SIB Project Area and the other project areas did not receive notice
13 as to how this EPA outreach effort would be relevant to all other project areas.

14 Respondents also dispute all costs for work identified in TIG’s evaluation of the
15 Contractor’s Invoices as category 3 (orange). As explained in TIG’s Evaluation, an items is
16 marked as orange where there is insufficient documentation to definitely determine that an item is
17 an Excluded Cost but, based on the description provided and their professional judgement, the
18 work is likely an Excluded Cost because it is (1) likely not consistent with the Work for the SIB
19 Project Area or (2) not part of a general work product that is applicable and necessary for the
20 efficient execution of the RD work at the SIB Project Area. Examples of work that was
21 inadequately described work and were identified to likely be Excluded Costs are:

- 22 ■ (3) Initiated development of a presentation with a procurement specialist to
describe CDM Smith’s EPA contract award and the firm’s procurement process.
- 23 ■ (3) Provided an update on earned value tracking metrics to the TOCORS.

24 The total amount of the CDM Smith disputed costs under categories 4 and 3, identified as
25 red and orange on the annotated Contractor Invoices, is \$540,924. 72. This amount also includes
26

1 all the tasks from Invoices 1 through 3, which are categorized as red because the work occurred
2 prior to September 1, 2020.

3 The Respondents do not dispute, and will pay for, the items in the Contractor Invoices
4 highlighted in green (category 1) for work that is adequately described and was determined by TIG
5 to be consistent with the Settlement and applicable to all project areas. Likewise, the Respondents
6 do not dispute the items highlighted as yellow (category 2) in the TIG Evaluation. Examples of
7 items categorized as inadequately described but likely within the EPA Future Response Costs
8 definition area:

- 9 ■ (2) Participated in Portland Sediment Evaluation Team meetings on February 10
and 24, 2021.
- 10 ■ (2) Coordinated with the State of Oregon and the City of Portland
11 contractor on Scribe electronic data deliverables.

12 Although Respondents requested that better descriptions of the future activities be
13 provided for the past cost items marked in yellow, TIG determined that the work likely relates in
14 some way to the SIB Project Area or to all project areas and Respondents will pay those amounts.
15 The total amount of undisputed Contractor Invoices is \$681,641.25.

16 **2. Respondents dispute EPA payroll costs, direct and indirect, in proportion to the**
17 **CDM Smith costs disputed.**

18 The Cost Recovery Package provided by EPA is broken out by employee listing payroll
19 hours and payroll cost per pay period. There is no additional documentation to determine what was
20 performed by the EPA employee; consequently, Respondents are unable to verify that the work or
21 activities performed are “site-wide remedial design oversight costs [that] were incurred for
22 activities that apply to and benefit the entire site and are not specific to any one project area.”
23 Given Respondents’ determination that 44% of CDM Smith’s costs are Excluded Costs,
24 Respondents have assumed that a comparable amount of EPA Payroll and Indirect Costs would
25 also likely be Excluded Costs. Respondents calculated the amount of Payroll and Indirect Costs
26

that are Excluded Costs in Table 2 below and provided the total amount of costs that are disputed in Table 3 below.

Table 2. Total Amount of Costs by Category²

	CDM Smith Costs by Category	Proportion	EPA Payroll and Indirect Costs by Category	Total by Category
Category 4: not within EPA Future Response Costs	\$237,027.59	0.19	\$244,588.72	\$481,616.31
Category 3: likely not within EPA Future Response Costs	\$303,897.13	0.25	\$313,591.39	\$617,488.52
Category 2: likely within EPA Future Response Costs	\$403,009.57	0.33	\$415,865.50	\$818,875.07
Category 1: within EPA Future Response Costs	\$278,631.68	0.23	\$287,519.98	\$566,151.66
Subtotal	\$1,222,565.97	1.00	\$1,261,565.59	\$2,484,131.56

TABLE 3. Total Amount of Disputed and Undisputed Costs

Total 10TC Costs	TOTAL	1/17th Share
Disputed (red and orange)	\$1,099,104.83	\$64,653.23
Undisputed (green and yellow)	\$1,385,026.73	\$81,472.16

III. CONCLUSION

Respondents appreciate the efforts made by EPA to provide information supporting the items invoiced as site-wide work intended to further remedial design for all project areas of the PH Site, including the SIB Project Area. Respondents also understand that due to agency procedures and invoicing protocols, detailed billing records may not be available. However,

² There is a discrepancy between the total amount of CDM Smith charges in EPA Cost Recovery Package and the total of the Contractor Invoices. Once that discrepancy is reconciled, Respondents will revise Tables 2 and 3 as necessary.

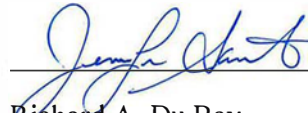
1 Respondents carefully negotiated the Settlement with EPA to ensure that there would be sufficient
2 funds to complete the RD for the SIB Project Area. Those funds are subject to a detailed funding
3 agreement with the Settling Federal Agencies and the Settling Public Entities and, as such,
4 Respondents have contractual obligations to ensure that the funds are expended to complete the
5 RD for the SIB Project Area pursuant to the terms of the Settlement. Based upon the
6 documentation provided, Respondents have determined that a total of \$1,099,104.83 are Excluded
7 Costs and therefore, dispute our 1/17th share of that amount or \$64,653.23. Of the remaining
8 amount, \$1,385,026.73, Respondents agree to pay their 1/17th share of \$81,472.16, less amount
9 paid in May (\$5,800.03) for a total payment of \$75,672.13.

10 Respondents request the opportunity to meet with the Regional Administrator to discuss
11 their concerns as outlined in this Statement of Position in a good faith effort to resolve this dispute.
12 In addition, we request a determination that all future Site-wide Remedial Design (10TC) payroll
13 costs and Contractor Invoices for which EPA seeks reimbursement include sufficient detail so that
14 Respondents may confirm that such costs come within the definition of EPA Future Response
15 Costs under the Settlement.

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17 Respectfully submitted this 12th day of July, 2022.
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